In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. [redacted] 51

SACRAMENTO NAVIGATION COMPANY (a corporation),
Petitioner,

vs.

MILTON H. SALZ, doing business as E. Salz & Son,
Respondent.

BRIEF FOR PETITIONER.

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INTRODUCTORY STATEMENT.

This is a cause in admiralty and involves the construction and scope of the Harter Act, (Act of Cong. Feb. 13, 1893, ch. 105; 27 Stat. 445).

The relevant portion of the Act involved is the following:

> "Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her

owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

The opinion of the District Court is found on page 117 of the Transcript of Record. The opinion of the Circuit Court of Appeals, affirming the decision of the District Court, is reported in 3 Fed. (2d) 759, and may also be found at page 139 of the transcript.

A writ of certiorari was granted by the Supreme Court on the 20th day of April, 1925.

I. STATEMENT OF THE CASE.

A. THE FACTS.

This is a libel *in personam* in admiralty brought by the respondent against the petitioner for damages sustained by the respondent as the owner of a shipment of barley carried by petitioner from a point on the Sacramento River, State of California, to a lower point on the same river. Petitioner is a common carrier of merchandise on said river.

The libel, in substance, alleges the following facts (Trans. p. 5-7):

That respondent herein was the owner of 9853 sacks of barley shipped and on board the barge "Tennessee"; that petitioner is engaged in the transportation of merchandise on the Sacramento River, and is the owner of the steamer "San Joaquin No. 4" and the said barge "Tennessee"; that respondent "shipped and turned over to" petitioner herein, and petitioner

received the said barley, which was loaded on the barge "Tennessee", "and under tow of the said stern wheel steamer 'San Joaquin' was being transported" from points on the river to Port Costa on the outlet of the river with San Pablo Bay; that while the barge with the barley on board was being towed by the steamer on October 1, 1921, the steamer negligently permitted the barge to come into collision with a British steamship at anchor; that as a result of the negligent collision the barge was swamped and the barley became a total loss; that the collision was caused *solely* by the negligent handling of the barge by the steamer.

(It should be particularly noted that the libel was promoted against petitioner *in personam* as owner of the barge and the negligent steamer.) (Libel II, Trans. p. 6.)

When the merchandise was turned over to petitioner, a bill of lading was issued by petitioner and received by respondent, of which the following is a copy:

> "Original receipt. Celli's Ldg., Sept. 23, 1921. Shipped by J. F. Bedwell, on board of the Sacramento Transportation Co's. Barge 'Tennessee' the following packages, contents unknown, to be delivered at Port Costa Dangers of fire and navigation, or any other peril, accident or danger of the seas, rivers or steam navigation, or steam machinery of whatever kind or nature, excepted; with the privilege of re-shipping in whole or in part, on steamboats or barges; also with the privilege of towing with one steamer, at the same time, between Sacramento and San Francisco, down or up, two or more barges, either loaded or empty.

Marked: Strauss & Co. Notify E. Salz & Sons.

No. of Pkgs.	Articles	Weight Subject to Correction
2919	bags of Barley	Lot 1
1642	"	" Lot 2

Received subject to all of the conditions and agreements contained in and endorsed hereon.

E. J. LEAVITT, Agent.

Accepted:

E. Salz & Sons, Shipper.
By J. W. Moynihan, Agent."

(Original exhibit on file in Supreme Court.)

For the purpose of this case the facts alleged in the libel, as above stated, may be deemed to be proved, including the negligence of the towing steamer, "San Joaquin No. 4", and the fact that said negligence was the sole cause of the loss of the barley, the barge having no motive power.

The uncontradicted evidence shows that both the barge and the towing steamer were in all respects seaworthy and properly manned, equipped and supplied.

Testimony of Captain Dolan. (Trans. pp. 27, 28);

Testimony of W. P. Dwyer. (Trans. pp. 108-113, inc.);

Testimony of G. H. Johnston. (Trans. pp. 101-103, inc.)

B. THE QUESTIONS.

1. The Principal Question Involved is Whether, Under the Circumstances, Petitioner is Exempt From Liability by Virtue of the Provisions of Section 3 of the Harter Act.

Petitioner's contention is that, the loss having resulted from faults or errors in navigation or in the

management of the vessel which was transporting the merchandise under a contract of affreightment, and the said vessel having been in all respects seaworthy and properly manned, equipped and supplied, the owner is not to be held responsible for the loss under section 3 of the Harter Act.

This involves the basic contention that, under the Harter Act, the "vessel transporting the merchandise", in connection with the customary river transportation as illustrated by the facts of the instant case, is not the barge alone, but *the combination of steamer and barge.* Respondent's contention in this behalf is, that the barge alone is the "vessel transporting the merchandise."

There is a second question injected into the case by respondent's contention that the case is one of towage, and is: May the owner of a towboat contract against liability caused to the tow or its cargo by the negligence of the navigator of the tug?

Neither of these questions have ever been decided by the Supreme Court.

II. ARGUMENT.

A. THE EXEMPTION OF SECTION THREE OF THE HARTER ACT APPLIES TO RIVER TRANSPORTATION.

> "Plainly the main purposes of the act were to relieve the shipowner from liability for latent defects * * * and, in event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or in the management of the vessel."
>
> *The Irrawaddy,* 171 U. S. 187, 192.

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>
> *The Irrawaddy,* 171 U. S. 187, 192.

By its language the Act applies to "any vessel transporting merchandise or property to or from any port in the United States."

> "This language cannot be construed otherwise than as meaning that the section shall apply to *all vessels transporting merchandise to and from any port of the United States, situated upon any navigable waters, inland or otherwise,* over which the federal government has jurisdiction."
>
> *In re Piper Aden Goodall Co.,* 86 Fed. 670, 671.

The Act applies, therefore, to river transportation such as is illustrated by the facts of the instant case, and to the "vessels transporting merchandise" on such rivers.

B. THE INSTANT CASE IS BASED UPON A CONTRACT OF AFFREIGHTMENT, NOT A TOWAGE CONTRACT.

Except for the fact that, in the lower courts, respondent has strenuously taken the position that the contract shown in this case is a towage, and not an affreightment contract, we would omit argument on this question which, we believe, the reading of the bill of lading cannot leave in doubt.

The libel prays for damages suffered by the shipper of the barley which became a total loss as the result of negligent navigation. The District Court held that "the grain that was lost belonging to Milton H. Salz was carried by the barge 'Tennessee' *under a bill of lading.*" (Trans. p. 117.)

The Circuit Court of Appeals held that "the bill of lading was made with the barge and did not include

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*(Italics in quotations ours.)

the tug * * * there was an implied contract that a *tug would* be furnished by the apellant to carry her to her destination." (Trans. p. 141.) Again the court said:

"There was no hiring of the tug for carriage of the cargo." (Trans. p. 144.)

It would seem to us that a finding that there was an implied contract that a tug would be furnished to carry the barge with the cargo on her to her destination (meaning obviously to the destination of the cargo), leads inevitably to the conclusion that the bill of lading contract was not made with the barge alone.

An inspection of the bill of lading shows that it was a contract made with the petitioner, a transportation company, and not with the barge. It was signed by the agent for the transportation company and by the agent for the shipper. The libel was brought against the petitioner *in personam,* who is described therein as being "engaged in the transportation of merchandise on the Sacramento River." (Trans. p. 6.) The libel alleges that "libelant had shipped and turned over to *respondent* (being the petitioner) and respondent had received (libelant's cargo) for *transportation*" (id.). It also alleges that the said "sacks of barley were loaded on said barge 'Tennessee' and under tow of the said stern wheel steamer 'San Joaquin No. 4' was being *transported* * * *" (id.) Of course it was the barge which was under tow of the steamer, and not the sacks of barley, and it was the sacks of barley which were being transported. Respondent's object, in shipping under the bill of lading, was to have its barley

transported from one point to another point of the river, and he made a contract accordingly. Such a contract is called a contract of affreightment. Under the bill of lading which respondent signed, petitioner had the right, if it chose, to dispense with the barge altogether and transport the cargo on board the steamer. The suggestion of "towing" sacks of barley on a river, and of an action to recover "for the negligent towage of his cargo of barley" contains an element of humor. Had respondent been the owner of a *ship* which he wished to have moved from Celli's Landing to Port Costa, he would have made a contract of towage with petitioner; but one does not tow barley, and no owner of barley would wish it towed. The fact that respondent labeled his suit a "cause of towage" does not make it a cause of towage. This appellation was probably provided, and mention of the bill of lading so studiously avoided in the libel, for the very purpose of steering the libel around the Harter Act.

The relation existing between respondent, cargo-owner, and the "San Joaquin No. 4" does not grow out of a contract of towage, but out of the bill of lading under which respondent's cargo was being transported from one place to another place on the river. In the opinion of the Circuit Court of Appeals, the Court said: "The only express reference to a tug was that the carrier reserved the privilege of towing with one tug other barges in the course of the voyage, a reservation evidently made to obviate objection to possible delay in transportation caused by the additional load." (Trans. p. 141.) This reference to towing was a subordinate incident in the transportation of the

cargo and did not make a towage contract out of respondent's affreightment contract.

Reading the bill of lading and the libel filed in this cause, should make it clear that this is not a suit for the negligent towage of respondent's cargo, but a suit based upon the contract of affreightment made between respondent, cargo-owner, and *Sacramento Navigation Company, a common carrier,* for the transportation of respondent's cargo between two points on a river by means of the customary instrumentality used for such a purpose, viz., a steamer taking barges in tow.

This reduces the problem before the Court to a consideration of the question: What is the "vessel transporting the merchandise" in the mode of river transportation customarily used in this country, and which was used in the instant case?

We shall show that this "vessel transporting the merchandise" is the combination of a steamboat and barges attached to it, the barges being considered as belonging to the steamboat and making a part of it.

C. STEAMER PLUS BARGE IS THE VESSEL TRANSPORTING THE MERCHANDISE.

1. The Question in the Supreme Court.

The question has been practically answered by this Court in the case of *The Northern Belle,* 9 Wall. 526, where the Court, in a case involving river transportation, said:

"The barges are owned by the same persons who own the steamboats by which they are propelled, and are generally considered as attached to and *making part of the particular boat in connection* with which they are used; though quite often an individual or corporation owning several boats, running in a particular trade, have a large number of barges, which are taken in tow by whatever boat of the same line may be found most convenient. *In every case, however, the barge is considered as belonging to the boat to which she is attached for the purposes of that voyage.*" (9 Wall. 528-9.)

The opinion shows that river transportation was originally conducted by placing the cargo in the hold of the steamboat; that the competition of railroads introduced in river tranportation the use of barges; that "this mode of river transportation * * * has superseded almost entirely the old mode of carrying by sacks in the hold of the *vessel.*" The Court, throughout the opinion, consistently and strictly refers to the *steamboat* whenever the word *"vessel"* is used, never using the word "vessel" as applied to the barges, recognizing that, in the nature of the transaction, the transporting vessel is the steamboat endowed with power to move, and that the powerless barges are merely parts of the particular steamboat moving them.

If, therefore, in the instant case, the word "vessel" is used in the sense in which this Court used it in the case of *The Northern Belle,* the problem presented by the instant case is solved; for it follows that, although respondent's merchandise was deposited on the barge, the "vessel transporting the merchandise" was the steamship "San Joaquin No. 4" and the barge; hence her owners were, by the Harter Act, *not responsible*

"for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

The Keokuk, 9 Wall. 517, was another case involving river transportation, and from the reasoning of the Court in that case it follows that the *steamer and barge,* under the circumstances attendant upon river transportation of cargo, is the "*vessel*" transporting the cargo.

In that case a steamer and barge were used in carrying freight. A shipper loaded the barge with wheat without knowledge of the carrier, but the barge was never delivered to the custody of the steamer. The barge with libellant's wheat sank at the dock, and a libel was filed against the *steamer and the barge.* The question was, whether there was a lien on the steamer and barge. The Court said:

> "It is very clear, had the *steamer* taken the barge in tow, the lien would have attached, although the bills of lading were not executed, because the act of towing the barge would be evidence that the grain was received, and that there was a contract to carry it safely. And *the steamer would be equally liable* if the barge had been left at the landing by the fault of the officers of the boat."
>
> (9 Wall. 517, 519, 520.)

In the instant case the bill of lading was executed and the steamer had taken the barge in tow; hence the steamer would (but for the Harter Act) have been liable in rem. The reasoning of the Supreme Court shows that the responsible "*vessel*" is the steamer, or at least the steamer and barge. The question was, just when does the law create a lien "on a

vessel as a security for the performance of a contract *to transport a cargo.*" (p. 519.) The "*vessel* to transport the cargo," to which the question was applied, was the *steamer and the barge.*

The barge belongs to the steamboat to which she is attached, and is a part thereof. The combination constituted the "vessel" or instrument of transportation during the voyage involved in the instant case.

2. The Question in the Ninth Circuit.

Petitioner's contention is supported by former cases decided by the Circuit Court of Appeals for the Ninth Circuit.

In the case of *The Columbia,* 73 Fed. 226, a barge lessee which was also the lessee of a tug and was operating both of them as owner, received a shipment of wheat to be transported between two points on the Columbia River. The captain of the *barge* executed a shipping receipt covering the wheat. The barge, having no motive power, was towed by the tug and when attempting to make a landing at night was so badly damaged by contact with the dock, that she later sank and damaged a large portion of the cargo. It will be noted that the facts are almost identical with those in the instant case.

The question before the Court was whether the barge and tug should both be surrendered in a proceeding commenced by the carrier to limit its liability for damages arising out of the accident. The Court said:

> "The Oregon Short Line & Utah Northern Railway Company, lessee of the barge and of the

tug Ocklahama, undertook to transport the wheat from Portland to the ship Westgate. The shipping receipt issued by the master of the barge to the owner of the wheat was issued on behalf of the owner of the craft. The contract of carriage was the owners' contract, and the terms of the contract were that the carrier was only to be liable to the owner of the cargo for negligence. According to the contract, the carrier was liable for negligence. As the wheat was to be carried on board the barge, which had no motive power, of necessity such power had to be supplied by the carrier. This the carrier did, as was its custom, by means of a tug,—in this instance the tug Ocklahama, owned by the Oregon Railway & Navigation Company, and under lease to the Oregon Short Line & Utah Northern Railway Company, as was the barge Columbia. When the tug made fast and took in tow the barge, to perform the contract of carriage, *the two became one vessel for the purpose of that voyage*,—as much so if she had been taken bodily on board the tug, instead of being made fast thereto by means of lines. The Northern Belle, 9 Wall. 526-529; Sturgis v. Boyer, 24 How. 110-122; The Merrimac, 2 Sawy. 595, Fed. Cas. No. 9,478; The Bordentown, 40 Fed. 686."

* * * * * * *

"In the present case, the barge and tug had the same owner, and both were operated by the same carrier. In the voyage, both were necessarily under the control of the master of the tug. *They constituted the instrument of carriage*, to which the wheat was liable for the service, and on which the owners of the cargo had a lien for the due performance of the contract of carriage."

* * * * * * *

"But no question of proximate cause, we think, arises in the case, for the reason that *the tug and barge are, in law, considered one vessel*, for the purpose of the voyage in question, and, whether

> the accident giving rise to the loss and damage be directly attributable to the acts of the master of the barge, or to those of the master of the tug, it is equally the negligence of the carrier, for which it contracted to be liable. It results that, in according the petitioners a limitation of liability without the surrender of the tug Oklahama, the Court below was in error."
>
> (73 Fed. 237-8.)

No question was raised in regard to whether one vessel was the active instrument and the other a passive instrument, as in an injury by tort. The decision was based upon the ground that the tug and barge were considered as being one vessel, engaged in a contract of carriage, for the performance of which the owners of the cargo had a lien upon both vessels—the instrument of carriage.

The Harter Act had not been passed when the accident happened and no question of exemption under that Act was involved.

However, it would seem to follow of necessity from the opinion of the Court, that in a case arising under the Harter Act, which applies to contracts of carriage, if the steamer and barge constitute a single instrument of carriage on which the owners of the cargo on the barge have a lien, then the corresponding responsibility of the owner of the instrument of carriage, as to seaworthiness and navigation, and as to faults in navigation and management, would apply to that instrument of carriage, and not to the barge alone.

The Columbia is referred to in the opinion of the Circuit Court of Appeals in the instant case as follows:

> "The Court had under consideration therein the limited liability statute, Rev. Stats. 4282-4290. It was held that where the owner of a barge undertook to transport cargo by means thereof and by its own tug, *the two vessels became one for the purpose of the voyage*, and that the owner was not entitled to limit his liability for damages caused by the negligence of the crew of either without surrendering both. We applied in that case the same rule of strict construction which has been indicated by the Supreme Court in construing the Harter Act. The purport of the decision was that the Carrier could not obtain the benefit of the limited liability statute without surrendering *the whole means by which it undertook to transport the cargo*, thus applying the principle that where two or more vessels belonging to the same person are engaged in a transportation service under a common direction, all are equally answerable for the negligence of the common head, 24 R. C. L. 1398, and the language of the Court in 'The Main' vs. Williams, 152 U. S. 122, 131, 132, where it was said: 'The real object of the Act in question was to limit the liability of vessel owners to their interest in the adventure."
>
> (Trans. p. 142.)

There would seem, therefore, to be nothing in the facts of *The Columbia* or the principles therein announced, which would warrant a distinction in the present case.

It was urged by counsel in the Court below, and will undoubtedly be urged here, that *The Columbia*

was overruled by the decision of this Court in the case of *Liverpool etc. Navigation Co. v. Brooklyn etc. Terminal,* 251 U. S. 48.

That case, however, was one of *collision,* arising under the limitation of liability statutes, and the question was: What is the limit of liability, under the statute, of the owner of the colliding vessel to the owner of the innocent vessel? If the colliding vessel is a car float carrying cargo, lashed to the side of a steam tug, both tug and tow belonging to the same owner, must the owner surrender, under the statute, both tug and tow, or the negligent tug alone? Evidently the answer to this question must be found in the language of the limitation of liability statute, which provides as follows:

> "The liability of the owner of any vessel, for any * * * *injury by collision* * * * shall in no case exceed the amount or value of the interest of such owner in such vessel. * * * "
>
> (Section 4283-R. S.)

In order to arrive at the interest of the owner in the offending vessel, it was necessary to differentiate between the two vessels and to determine *which one* of the two vessels committed the *injury.*

This Court held that under the statute, the value of the tug alone was the limit of the owner's liability, on the grounds that *"for the purpose of liability, the passive instrument of the harm* (the car float) *does not become one with the actively responsible vessel* (the tug); and that, under the language of the statute, the owner is free if he surrenders *'the offending vessel'."*

The Columbia, however, was not a collision case, but arose under a contract of affreightment, as in the present case. There was no mention of *The Columbia* in the *Liverpool* opinion, and the Court stated:

> "Earlier cases in the Second Circuit had disposed of the question there, *and those in other circuits for the most part if not wholly are reconcilable with them.*"
>
> (251 U. S. 54.)

This would seem to indicate that there was no intention to overrule *The Columbia,* arising out of a contract of affreightment by the *Liverpool* case, which involved an entirely different question.

In fact the distinction between the two kinds of cases was admitted by counsel in the argument of the *Liverpool* case before this Court, when they said:

> "We also agree that the fact that the vessels are to be regarded as one for the purposes of a joint undertaking of their owner may have no bearing upon the question of their respective liabilities *in rem.* But neither of these considerations has any bearing upon the question of what must be surrendered by a respondent as a condition of limiting his liability."
>
> (251 U. S. 50.)

The rule announced in *The Columbia* was followed in the Ninth Circuit in a later case, *The Seven Bells,* 241 Fed. 43.

In that case the cargo owner sued to recover for merchandise which was lost while being transported by water from San Francisco to San Rafael. The goods were loaded on a barge operated by a transportation company, and bills of lading were issued cover-

ing the merchandise, as in the instant case. The barge was towed by the launch "Seven Bells," owned by a third party, under a contract with the transportation company covering the services of the launch.

The barge and owners, and the launch were all joined as respondents in the action. The owners of the launch sought to escape liability upon the ground that they were not common carriers, and had no relations with the shipper of the goods, but that their contract was one of towage with the owners of t barge, under which contract they were only obliged to use ordinary care. (In the instant case the contention of the parties is just the reverse—the shipper, in order to avoid the Harter Act, contends that the relationship is based upon a contract of towage, while the carrier asserts that the contract was one of affreightment and invokes the Harter Act.)

The Circuit Court of Appeals held in favor of the shipper, (exactly as the petitioner is contending here), that the contract was not one of towage, but of carriage, stating:

> "That was not, in our opinion, a mere contract of towage, but one of carriage, and under it we think the launch and the barge became *one instrumentality* in the voyage; the owner of the barge becoming owner of the launch *pro hac vice*, and *the liability of the one instrumentality that of carrier*. The Columbia, 73 Fed. 226; 19 C. C. A. 436, and cases there cited."
>
> (241 Fed. 45.)

The barge owners set up the Harter Act as a defense, but the Court held them liable not on the ground that the Harter Act did not apply, but on the ground that the

combination of launch and barge were not sufficient during the winter weather for the business in which they were engaged. In other words, the combination was unseaworthy and therefore the Harter Act could not be used as a defense.

In the opinion in the instant case the Court, in referring to *The Seven Bells,* said:

> "It is true that in that case the Harter Act was set up as a defense, but it was not involved in the decision, as the owner of the cargo recovered judgment for his damages on the ground that the tug was insufficiently equipped to handle the barge."
>
> (Trans. p. 143.)

It is respectfully submitted that the finding in that case, that the tug was unseaworthy and the conclusion drawn therefrom that the Harter Act does not apply, involves impliedly the conclusion that tug and tow "became *one instrumentality*" and are, within the scope of the Harter Act, the "vessel transporting merchandise" on the particular voyage; for, had the barge alone been considered as the "vessel transporting merchandise," the seaworthiness of the barge would be the only question involved and the seaworthiness of the tug would not be material. *The Seven Bells* is therefore authority in favor of petitioner's contention.

As in the case of *The Columbia,* the facts in *The Seven Bells* so closely resemble the facts in the present case that it is impossible to perceive the distinction that the Circuit Court of Appeals attempted to draw.

In *The Thielbek,* 241 Fed. 209, the same Court held that a tug and bark, being lashed together for the purpose of towing the bark, become one vessel for the purpose of navigation.

3. The Question in the Alabama District Court.

In *The Nettie Quill* (Southern District of Alabama), 124 Fed. 667, a river steamboat, engaged in carrying cargo as a common carrier, agreed to transport libelant's locomotive up the river, libelant furnishing the barge on which the locomotive was loaded, both being thereupon delivered to the steamboat. The barge was lashed to the steamboat. As the steamboat and barge proceeded up the river, the barge struck a log, was sunk and dumped the locomotive into the river. Assuming that the loss arose from faults in navigation, the Court held that the steamboat and her owners were not responsible for the loss, under the Harter Act. The Court said:

> "The barge was furnished. It was lashed to the steamboat, and became thereby as much *a part of her* as her own barge was, for the purposes of the particular voyage. * * * The contract being a contract of affreightment, if the loss arose from dangers of the river, or resulted from faults or errors in navigation or in the management of the steamboat, then, under the act of Congress known as the 'Harter Act', the steamboat and her owners would not be responsible for the damage or loss."
>
> (124 Fed. 669.)

The Circuit Court of Appeals in the instant case distinguishes the case of *The Nettie Quill* as follows:

> "In holding that the contract was one of affreightment the Court said: 'A contract of af-

> freightment is a contract with a ship owner to hire his ship or part of it for the carriage of goods or other property.' We may point to that expression of the Court as the distinguishing feature of the decision. It serves also to distinguish that case from the case at bar. for here there was no contract with the tug, and there was no hiring of the tug for carriage of the cargo."
>
> (Trans. p. 144.)

We respectfully submit that the contract in the instant case was a contract of affreightment, as it was in *The Nettie Quill* case; in both cases there was a hiring of the tug for carriage of the cargo. Respondent could not have thought of the powerless barge "Tennessee" as the instrument for the moving of his cargo down the river. If he had been disposed to so think of it, his bill of lading would have advised him that a steamboat would be used in the transportation as part of the instrument of carriage and possibly the sole instrument; for the carrier had the right under the bill of lading to take the barley from the barge, reload it on the steamer and carry it down the river on board the steamboat. Primarily there was a contract with the Sacramento Navigation Company, petitioner, for transportation by steamboat.

4. The Question on Principle.

The foregoing authorities support the principle that the *"vessel transporting merchandise", to or from* a port, in the customary method of river transportation, is not the lifeless barge, but is the *steamboat-plus-barge*, used as a unit of transportation. How could there be a *voyage* by means of a powerless barge?

How could a motionless barge be a *"vessel transporting* merchandise * * * *to* or *from* any port"? How is "navigation" conceivable without motion, without power to move; how could the powerless barge alone be conceived of as an instrument of transportation of merchandise from one point of the river to another point of the river?

The *ratio decidendi* stated in the opinions of the Courts below is based upon an erroneous construction of the contract.

The *District Court* said:

> "The grain that was lost belonging to Milton H. Salz was carried by the barge 'Tennessee' under a bill of lading *issued for it only and not for the towing steamer,* and though the towing steamer and the barge belonged to the same owner, the Harter Act does not apply."
>
> (Trans. p. 117.)

The *Circuit Court of Appeals* said:

> "There was no contract here between the appellee and the barge and the tug. The bill of lading was made *with the barge* and did not include the tug, and there is nothing therein to indicate that the tug and the tow were engaged in a common venture. Since the barge had no power of her own there was an implied contract that a tug would be furnished by the appellant to carry her to her destination. The only express reference to a tug was that the carrier reserved the privilege of towing with one tug other barges in the course of the voyage, a reservation evidently made to obviate objection to possible delay in transportation caused by the additional load."
>
> (Trans. p. 141.)

To sum up, the District Court said that the bill of lading was "issued *for* it (the barge) only and not *for* the towing steamer"; the Circuit Court of Appeals said that "the bill of lading was made *with* the barge and did not include the tug". We submit that the bill of lading shows a contract between E. Salz & Sons and Sacramento Transportation Company, both of whom signed the bill of lading by their respective agents. It was certainly not a contract *with* the barge or even with the captain or other navigator of the barge, nor does it appear that the barge has any captain or navigator. It was not a contract with the transportation company *for* the barge *only*. It was a contract with the petitioner herein for the transportation of respondent's merchandise by means of the customary instrumentality for river transportation, viz., the specified barge and an unspecified steamer referred to in the bill of lading. We submit that the Circuit Court of Appeals erred in holding "that there is nothing therein (the bill of lading) to indicate that the tug and the tow were engaged in a common venture". The goods could not be "delivered at Port Costa" (a point lower down the river) without moving the barge from Celli's Landing to Port Costa. The contract referred to "*navigation*" and to "peril or danger of the seas, rivers or *steam navigation*". The steamer which was to and did tow the barge, and the barge herself, were necessarily engaged in the common venture of transporting respondent's goods from the point of shipment to Port Costa. This would seem to follow also from another finding of the Circuit Court of Appeals that, "there was an implied

contract that a tug would be furnished by the appellant to carry her to her destination". Assuming an *express* contract that the cargo shipped on a barge should be transported to a distant destination, and a simultaneous *implied* contract that the barge should be towed to destination by a tug, is there any escape from the conclusion that *barge and tug* were to engage in the common venture, whereby respondent's goods should eventually be delivered at destination?

D. ANALYSIS OF THE TWO CASES UPON WHICH THE OPINION OF THE CIRCUIT COURT OF APPEALS RESTS.

The Circuit Court of Appeals rests its decision upon two cases, viz., *The Murrell,* 200 Fed. 826, (affirmed in *Baltimore & Boston Barge Co. v. Eastern Coal Co.,* 195 Fed. 483), and *The Coastwise,* 230 Fed. 505 (affirmed in 233 Fed. 1), saying on the authority of these cases:

> "We are of the opinion that the Harter Act applies only to the relation of a vessel to the cargo with which she is herself laden and does not relieve the owner of a tug from liability for its negligence in towing the barge on which the cargo is carried."
>
> (Trans. p. 143.)

It should be noted, in connection with the two cases in the First Circuit, that the *Coastwise* case does not consider the question involved on principle, but simply follows the binding authority of the *Murrell* case, previously decided in the same Circuit. The District Court said, in the *Coastwise* case:

> "Does the Harter Act relieve the tug from liability? As an original question, I should regard this as a doubtful, as it certainly is an important, one; but I think it has been *closed, so far as this court is concerned,* by the decision in Baltimore & Boston Barge Co v. Eastern Coal Co. (C. C. A. 1st Circuit), 195 Fed. 483."
>
> (230 Fed. 505, 509.)

One distinguishing feature of both of these cases is that neither involves the customary river transportation by means of steamboat-plus-barge in tow. We now proceed to point out other points of distinction.

1. The *Murrell* case, supra, is distinguishable from the instant case by the following facts, which we consider fundamental:

(a) The *Murrell* case was not a case of a contract of affreightment, but "the case of an agreement by the owner of a tug to tow another owner's vessel".

(233 Fed. p. 3.)

(b) In the *Murrell* case the District Court stressed the fact that

> "Neither the subcharter of the barge nor the bill of lading given for the coal on board her has been offered in evidence, and it does not appear that either of them refers to this or any particular tug as having any connection with the contract for transportation made with the owner of the coal."
>
> (200 Fed. 831.)

In the instant case the Circuit Court of Appeals found as follows:

> "There was an *implied contract* that a tug would be furnished by the appellant to carry her to her destination. The only *express reference* to a tug was that the carrier reserved the privilege of towing with one tug other barges in the course of the voyage."
>
> (Trans. p. 141.)

An inspection of the bill of lading shows that steam navigation was contemplated by the parties as the mode of transportation, and the carrier was given the privilege of towing two or more barges "with one steamer". The contract of transportation made with respondent, the owner of the cargo, connected respondent expressly with the steamboat of the carrier. Respondent knew, before the barge was taken in tow by the steamer, that his cargo would be transported by a steamer to be connected with the barge; that steamer-plus-barge would be the instrument of transportation. Respondent even knew that, under the contract, petitioner had the privilege of re-shipping the cargo on the steamer "San Joaquin No. 4" before the actual transportation commenced; that therefore the cargo might either remain "cargo on board the barge" or become literally the cargo of the steamer.

(c) In the *Murrell* case the owner of barge and tug instituted *limitation proceedings* and surrendered the *tug only,* making the contention that tug and barge were not one vessel, but were distinct. The Court properly held that the owner was thereby precluded from contending that both vessels could, for another purpose, be treated as one, saying:

> "Moreover, while it is true that the tug was taking part in the transportation of the cargo,

> and that *tug and tow, even when not make fast alongside each other, are to be regarded as one vessel for many purposes,* so to regard them in this case, in order to call cargo on board the barge cargo of the tug, and thus bring the case under the Harter Act, is to permit the petitioner to treat both vessels as one in a proceeding instituted by him on the theory that they are distinct and independent. If this cargo is to be regarded as the tug's cargo and the tug's contract one of affreightment, as in The Nettie Quill, because both vessels are one as regards the cargo, justice would seem to require that both vessels should be liable for the fault of either, and that both should be surrendered in order to limit the liability to the cargo owner incurred by the negligence of either."
>
> (200 Fed. 832.)

In the instant case no limitation proceedings have been instituted; petitioner is in nowise embarrassed in its contention by any facts or contentions inconsistent with its claim under the Harter Act.

(d) The *Murrell* case was considered on appeal to the Circuit Court of Appeals for the First Circuit. (*Baltimore & Boston Barge Co. v. Eastern Coal Co.,* 195 Fed. 483.) It is interesting to note that the latter Court is, on principle, wholly with this petitioner on the contention involved in the instant case, but that its decision affirming the lower Court is reluctantly adverse to our contention by reason of a misconception of certain cases in the Supreme Court to be discussed hereafter. The Court said:

> "We cannot overlook the fact that in this case the relations of the tug to the cargo of the West Virginia were not merely those of tug and tow, but perhaps, also, those of the owner of a vessel and the owner of a cargo; so that, at common law, the

liability of the tug was not merely for ordinary care, but perhaps that of the guaranty which a common carrier gives the person whose merchandise he transports. Consequently, if in this case the loss of the cargo had arisen through errors in the navigation of the barge West Virginia, arising aboard of her, the Harter Act would perhaps apply. It cannot, perhaps, be denied that *the tug was 'transporting' the cargo of the West Virginia;* nor can it, perhaps, be denied that the *relations of the tug to the cargo were within the equity of the statute,* which was intended to relieve seagoing vessels from the extreme liability at common law of carriers towards the owners of the merchandise carried. These are very serious questions, as a very large portion of the coal traffic now on the Atlantic Coast is conducted in the manner shown here. *The owners of the tugs are transporting cargoes for which they receive freight; not merely towing barges."*

(195 Fed. 485.)

It thus appears that the Circuit Court of Appeals for the First Circuit would find that the relation between the steamer "San Joaquin No. 4" and the barge "Tennessee" is not merely that between tug and tow, but that the steamer "San Joaquin No. 4" was really *"transporting"* the cargo of the barge "Tennessee".

A decisive factor is undoubtedly that the same Circuit Court of Appeals does not consider the *Murrell* case as one based upon a contract of affreightment, but, as the Court says, in *The Coastwise:*

"It will be seen that, in The Murrell, this court had before it *the case of an agreement by the owner of a tug to tow another owner's vessel;* and this court held that there is nothing in such

> agreement to make the latter vessel, or her cargo, the cargo of the tug."
>
> (233 Fed. p. 3.)

The instant case is not the case of an agreement by the owner of the steamer "San Joaquin No. 4" to tow the barge of another owner; both steamer and barge belong to the same owner, and there is no towage agreement in the case.

In spite of arguments which point on principle to the opposite conclusion, the Circuit Court of Appeals affirmed the decision of the District Court, basing its affirmance upon the following language applied to the Harter Act in the case of *The Irrawaddy*, 171 U. S. 187:

> "Upon the whole, we think that in determining the effect of this statute in restricting the operation of general and well-settled principles, our proper course is to treat those principles as still existing, and to limit the relief from their operation afforded by the statute to that called for by the language itself of the statute."
>
> (171 U. S. pp. 195-6.)

This was said in a case of transportation on the high seas in one cargo steamer, not involving the fundamental question of the instant case. We contend that the Harter Act had in mind the relations which exist between merchandise to be transported by water (whether high seas or inland), and the vessel transporting the merchandise.

We are not asking for relief beyond that called for by the language itself of the statute.

2. *The Coastwise,* supra, is distinguishable from the instant case in the following particulars:

(a) One distinctive fact is that, in that case, the barge was not a public carrier at all, but *was let by her owner by charter to the cargo owner,* to carry a cargo between two ports. The tug was not chartered, but was used by its owner to tow the barge. The case was, therefore, a case of private carriage. This fact alone is decisive; for the Harter Act does not apply to private carriers; its language applies to "any bill of lading or shipping document," and not to charter-parties. (*The Fri,* 154 Fed. 333; *The G. R. Crowe,* 294 Fed. 506.) While this decisive fact is not referred to in the arguments or opinions of either the District Court or the Circuit Court of Appeals, it eliminates this case as an authority which could control the instant case.

The District Court said:

> "Does the Harter Act relieve the tug from liability? As an original question, I should regard this as a doubtful, as it certainly is an important one; but I think it has been *closed,* so far as this Court is concerned, *by* the decision in *Baltimore & Boston Barge Co. v. Eastern Coal Co.* (C. C. A. 1st Circuit) 195 Fed. 483."
>
> (230 Fed. 505, 509.)

(b) In *The Coastwise* the "cargo was put upon the claimant's barge, under a bill of lading signed by the *captain of the barge.*"

The Court said:

> "Here the contract of towage was made by the tug; the bill of lading for the cargo was made by

> the barge. It is clear, then, that, up to the time when the hawser was passed from the tug to the barge, the coal was the cargo of the barge alone. If, then, we follow the claimant's contention, we are compelled to hold that the cargo was at one time the cargo of the barge alone, and at a later time the cargo of the tug as well."
>
> (233 Fed. p. 3.)

The facts in the instant case are different. Here barge and steamboat are both owned by petitioner and used in its business as one instrument of river transportation. The bill of lading was not signed by a person representing the barge, but by the transportation company, by its agent, as owner of the steamer and barge, and it referred to the use of a steamer in the transportation. Petitioner makes no contention that respondent's cargo was at one time, or ever, the cargo of the barge alone, and at a later time the cargo of the tug as well. Petitioner's contention is that the cargo was at all times the cargo of the instrument of transportation used by petitioner in the river traffic, viz., the cargo of steamer-plus-barge.

(c) Another distinction between *The Coastwise* and the instant case is, that the former involved a contract of towage, whereas the latter involves a contract of affreightment. The Circuit Court of Appeals said, in *The Coastwise:*

> "Here the contract with the tug was clearly a contract of towage. The bill of lading was made with the barge only, not with the tug. There is nothing to indicate an attempt to combine the tug and barge into a single maritime adventure."
>
> (233 Fed. 3, 4.)

In the instant case the contract was not a contract of towage; the bill of lading was not made with the barge, or the captain of the barge, but with the petitioner as owner of the transporting instrumentality customarily used in the carriage of cargoes such as respondent's. The contract expressly shows that, for the purpose of the transportation, a steamer would be combined with the barge in the particular maritime adventure contemplated by the contract; but apart from the contract, the universal and well-known custom prevailing in river transportation combined the steamer and the barge into the transporting vessel used for the particular maritime adventure. Steamer-plus-barge was the "vessel transporting the merchandise" as referred to in the Harter Act.

E. THE DELAWARE AND THE IRRAWADDY DO NOT SUPPORT THE DOCTRINE OF THE MURRELL AND THE COASTWISE, NOR THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THE INSTANT CASE.

Both *The Murrell* and *The Coastwise* were somewhat reluctantly decided, the Courts feeling bound by the supposed authority of the above cases in the Supreme Court. We think we have effectively pointed out the decisive distinctions between *The Murrell* and *The Coastwise* on the one hand and the instant case on the other, so that the petitioner's contentions should prevail even on the assumption that these cases were correctly decided. But we go further and maintain that, even on the assumption that the distinctions pointed out be held to be insufficiently persuasive, there is nothing in the cases in the Supreme

Court which could govern the questions raised by the facts in this or even the *Murrell* case, or which should have prevented the Circuit Court of Appeals of the First Circuit, in the *Murrell* case, from following the logic of the principle to which it inclined and from holding that the Harter Act applied to the circumstances of this case.

The Delaware, 161 U. S. 459, was a case of collision between a steam tug and the steamship "Delaware", which occurred in the year 1893, shortly after the Harter Act was passed. The "Delaware" was found at fault, and one of the questions considered was whether she was exempted from liability to the tug by reason of Section 3 of the Harter Act. This was the first case before this Court on the construction of the Act. The Court reviewed the history of the Act and stated:

> "It is entirely clear, however, that the whole object of the act is to modify the relations previously existing between the vessel and her cargo. * * *
>
> "These provisions have no possible application to the relations of one vessel to another, and are mainly a re-enactment of certain well-known provisions of the common law applicable to the duties and liabilities of vessels to their cargoes."
>
> (161 U. S., pp. 471, 474.)

The facts presented in *The Delaware* do not have the remotest resemblance to those in the instant case. That was an action in tort by the tug against the other vessel to recover damages for collision. The tug was not towing "The Delaware" or connected with her in any way, but the vessels were on crossing

courses. No question of cargo liability was involved, nor was there any discussion of the relations between a tug and her tow. The only point decided, on the facts before the Court, was that in a collision between two vessels, the vessel at fault could not escape liability for the other's damage, by reason of anything in the Harter Act.

Clearly, the instant case does not involve the relation of one vessel to another, but, to use the language of the Court, involves "the duties and liabilities of vessels to their cargoes", and therefore the provisions of the Harter Act.

The *Irrawaddy*, 171 U. S. 187, is cited by the Circuit Court of Appeals for the First Circuit in both the *Murrell* and the *Coastwise* cases, and also by the Circuit Court of Appeals in the instant case (Trans. p. 141), to support the conclusion that the Harter Act "is dealing with the specific vessel on which the merchandise is being transported". This conclusion seems to be based upon the following language of this Court (171 U. S. at pages 195 and 196), which is cited in the *Murrell* case (195 Fed. 485):

> "Upon the whole we think that, in determining the effect of this statute in restricting the operation of general and well-settled principles, our proper course is to treat those principles as still existing, and to limit the relief from their operation afforded by the statute to that called for by the language itself of the statute."

Thus there remains the problem of finding a proper answer to the general question:

> What relief from the operation of general principles is called for by *the language itself* of the Harter Act?

Applied to the facts of the *Irrawaddy* case, the specific question was:

Has the shipowner, by virtue of the Harter Act, a right to general average contribution from the cargo, where his vessel stranded by the negligence of her master? The Court held that the Harter Act called for no such relief, but that the specific question was governed by general and well-settled principles. The reason for the decision was that the Court could not say from the language used in the Act that it was the intention of Congress to allow the owner, whose master's negligence caused the stranding, to share in the benefits of a general average contribution.

There is a long step between exempting the shipowner from responsibility "for damage or loss resulting from faults or errors in navigation" and allowing the shipowner to share in the benefits of a general average contribution. The Court refused to include the latter relief within the scope of the Harter Act, saying:

> "Plainly the main purposes of the act were * * * *to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation* * * *."
>
> (171 U. S. 192.)

Now, as applied to the customary river navigation exemplified in this case, "the ship", or instrument of transportation, is the *steamer-plus-barge.* It must be conceded that the Act applies to all transportation of merchandise by vessel, including river transportation. It follows therefore, that, with reference to the latter kind of transportation, plainly one of the purposes

of the Act was to exempt the shipowner from damage or loss resulting from faults or errors in navigation or in the management of the ship, or instrument of transportation, used in the commerce carried on the rivers of this country.

In other words, we answer the general test question propounded by the Court in the *Irrawaddy* case by saying that, as applied to the case of river transportation, *the language itself* of the Harter Act calls for *this* relief from the operation of general principles: That if the owner of the instrumentality transporting merchandise on a river exercises due diligence to make his instrumentality in all respects seaworthy, such owner is not responsible for damage or loss resulting from faults or errors in navigation or in the management of said instrumentality, by the language itself of the Act.

Whereas a decision that the Harter Act gives the negligent shipowner a right to general average contribution would have extended the operation of the Harter Act beyond the language itself of the statute, a decision that the Harter Act gives the same relief to the common carrier of cargoes on our rivers which it affords to the common carrier on the high seas is "called for by the statute".

The Harter Act is entitled "An Act relating to *navigation of vessels*"; it applies to "*any* vessel transporting merchandise or property from or between ports of the United States". Navigation connotes the *power to move as directed;* an Act relating to navigation of vessels relates, therefore, to instrumentalities

which have the power to move as directed by the navigator. No reason can be suggested why the Act should not apply to a vessel transporting merchandise on rivers, or why the owner of such a vessel should not receive its benefit as much as the owner of ocean-carrying vessels. In fine, the Act applies to the instant case, where merchandise was transported under a bill of lading, the navigation being conducted on a river by the instrument of navigation customary in such cases.

III. IRRESPECTIVE OF THE HARTER ACT PETITIONER IS EXEMPTED FROM LIABILITY BY THE TERMS OF THE CONTRACT.

A. ADOPTING THE VIEW OF THE CIRCUIT COURT OF APPEALS, THAT THE BILL OF LADING CONTRACT IS A CONTRACT WITH THE BARGE ONLY, STILL PETITIONER IS EXCUSED BY ITS TERMS.

The exceptive clause in the bill of lading reads as follows:

> "Dangers of fire and navigation, or any other peril, accident or danger of the seas, rivers or steam navigation, or steam machinery of whatever kind or nature, excepted."
>
> (Original exhibit—filed in Supreme Court.)

The Circuit Court of Appeals held that these exceptions "apply only to the barge and not to the tug or to any other vessel, or to the appellant as the owner of the tug". (Trans. p. 145.) However, the barge has no steam or other power, nor steam machinery; without another vessel or tug it is not exposed to dangers of navigation, or steam navigation, or steam machinery. The towing of the barge with a steamer is referred to in the same bill of lading; it would there-

fore seem to be conclusive that the dangers of "steam navigation, or steam machinery", referred to in the exceptive clause, purport to be dangers connected with the steamer towing the barge. Furthermore, the exceptive clause excuses the owner from delivering the barley shipped on the barge at Port Costa, if prevented by "any other accident or danger of the rivers". As applied to the customary method of river transportation, an accident or danger of the rivers includes a collision caused by the negligence of the tug which takes the barge in tow in the regular course of the transportation.

B. ADOPTING RESPONDENT'S VIEW THAT THE CONTRACT IS A CONTRACT TO TOW THE BARLEY, STILL PETITIONER IS EXCUSED BY ITS TERMS.

The Circuit Court of Appeals does not appear to have endorsed the view that this case involves a towage contract. Both lower Courts refer to the contract as a "bill of lading". However, respondent has persistently maintained the contention that the suit is brought against petitioner as owner of the towing steamer and not as owner of the barge, for *"the negligent towage of his cargo of barley"*. He claims, however, that the exceptive clauses are not intended to cover negligent towage, and that, if they were, they would be invalid under the law of tug and tow.

In our opinion this contention is inconsistent with the theory of the Circuit Court of Appeals; for how could the contract in question be a contract of affreightment, i. e., a bill of lading, and at the same time a towage contract forming the basis for a suit against

the owner of the tug for negligent towage? We contend that the lower Courts are correct in considering the contract as one of transportation or affreightment (a bill of lading), and it seems quite plain to us that the contract in the suit cannot be construed as a towage contract without violation of its terms and disregard of the circumstances.

1. Assuming the Contract to be One of Towage, the Exceptive Clause Excuses Negligent Towage.

The principles of the law of towage are distinct from those of the law applying to common carriers. The owner of the towboat is, by the general law, only liable for negligence in the performance of the towage service; he is not liable for dangers of navigation unaccompanied by negligence; there is no need of his protecting himself against liability for such risks. If, therefore, he makes an express contract that, in this particular towage operation, dangers of navigation *"of whatever kind or nature"* are excepted, he clearly intends to relieve himself from risks for which, but for the stipulation, he would be liable.

In *"The Oceanica"*, 170 Fed. 893 (C. C. A. 2d), the Court said (p. 894):

> "It follows that a contract against liability for negligence cannot be construed in the case of a tug as it may be in the case of a common carrier. The tug being only liable for negligence, if the tow agrees to assume all risks, no risks can be meant except those for which the tug is liable, viz., the consequences of her own negligence. There is no other class of risks upon which the clause can operate as in the case of common carriers, viz., those arising from liability as insurer. *Unless construed to cover the tug's negligence, the stipulation is meaningless.*"

This Court denied a writ of certiorari in the case cited. (215 U. S. 599.)

We appreciate that, in the case of a bill of lading like *Liverpool & Great Western Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, the words "perils of navigation of whatever kind" do not include perils of that kind which arise from negligence; for there is, in a case of common carriage, a margin of risk outside of negligence, upon which the clause can operate. On the other hand, in the case of responsibility for towage, "perils of navigation of whatever kind" have, after the elimination of purely accidental perils, nothing to operate upon except the negligence of those who do the towing.

2. Clauses Purporting to Excuse Negligent Towage Are Valid.

Respondent has strenuously contended that, in the law of towage, clauses purporting to excuse the owner of the tug from liability for damage caused to the tow or its cargo by the negligence of the tug's navigator are against public policy and therefore void.

This raises an important question, upon which there is a conflict at present among the lower federal Courts. The Circuit Court of Appeals for the Second Circuit has held that such contractual exemptions are valid and binding; on the other hand the Circuit Court of Appeals for the Ninth Circuit has held that such contracts are against public policy and void.

The Supreme Court has never squarely decided this question. Respondent contends that it was decided in his favor in *The Syracuse*, 12 Wall. 167; we, on the other hand, contend that the language relied upon by

respondent is merely *obiter dictum* and that, on the contrary, this Court supports our contention, at least by implication, in the recent case of *British Columbia Mills Tug & Barge Co. v. Mylroie,* 259 U. S. 1.

We now proceed to discuss this question.

In *The Oceanica,* supra, the Court upheld the right of a tug to contract against her own negligence.

In *The Maine,* 151 Fed. 401; affirmed 170 Fed. 915 (C. C. A. 2d), a lighterage company furnished the barge upon which libelant's cargo was carried, and the tug which towed the barge. The contract provided that the shipper should have no claim for any loss of cargo. This clause was attacked on the ground that it was void as against public policy, but the District Court and Circuit Court of Appeals held that the clause is valid.

The G. R. Crowe, 287 Fed. 426; affirmed 294 Fed. 506 (C. C. A. 2d) (certiorari denied—264 U. S. 586), involved the right of a private carrier to stipulate against damage caused by its own negligence. Referring to the clause: "The steamer is not to be accountable for leakage," the District Court said:

> "This exception covers the shipowner's *negligence*, because that is the only case in which a private carrier, as bailee for transportation, and not as insurer, is liable at all." (287 Fed. 427.)

The Court held that, by virtue of the clause, the carrier was exempted from liability for damage due to his own negligence. The Circuit Court of Appeals quoted with approval the opinion in the case of *The Fri,* 154 Fed. 338, in which it was stated:

> "It has not yet been decided by any court that a condition in such a contract, to which the Harter Act has no application, relieving a shipowner from liability on account of the carelessness of its employees, is contrary to public policy." (294 Fed. 508.)

The Circuit Court of Appeals for the Ninth Circuit, in its opinion in the instant case, has apparently come to the opposite conclusion, saying with reference to the right of a tug to contract against her own negligence:

> "We think that it is a departure from the principles announced in the decisions of the Supreme Court which we have cited." (Trans. p. 146.)

The decisions referred to are: *The Steamer "Syracuse",* 12 Wall. 167; *Liverpool Steam Co. v. Phoenix Ins. Co.,* 129 U. S. 397. As to the latter case, it seems quite evident to us that it does not decide the point involved here, for the obvious reason that it affects the liabilities of common carriers, and not of private carriers or towboat men; that, as referred to common carriers, the exception "dangers of navigation of whatever kind" does not touch the negligence of the carrier, whereas, in the case of private carriers and towboat men, the exception sweeps away the liability for negligence.

As to *The Syracuse,* the language relied upon by respondent was *obiter dictum.* The question before the Court was not, what the clause meant, or whether or not it was invalid. That the case is so considered by the Supreme Court, and not as a decision upon the question, seems to follow from the subsequent

position which the Supreme Court has taken with reference to the question, and which we will discuss hereafter.

In the *Oceanica* case, supra, the Circuit Court of Appeals for the Second Circuit discussed the *Syracuse* case, reached the conclusion that the Supreme Court did not decide the point, and thereupon decided the point independently and adversely to the contention of respondent and the view of the lower Court herein. Thereafter the *Oceanica* case was before the Supreme Court by a petition for certiorari which was denied. (215 U. S. 599.) A reasonable inference from the denial of the petition is, that the Supreme Court did not consider the decision in the *Oceanica* case to be in conflict with what the Supreme Court had previously decided upon so important a question.

This case has since been followed in the Second Circuit in *Monk v. Steamboat Company*, 198 Fed. 472, and *Ten Eyck v. Director General of Railroads*, 267 Fed. 974.

The question under discussion had significant light thrown upon it in the history of the case of *Mylroie v. British Columbia Mills Tug & Barge Co.*, (C. C. A. 9th), 268 Fed. 449. In that case the Circuit Court of Appeals for the Ninth Circuit refused to follow the *Oceanica* and held that a tug is not allowed by law to avoid by contract the consequences of its own negligence. Petition for certiorari was granted by this Court (255 U. S. 566), and the judgment of the Circuit Court of Appeals was affirmed (259 U. S. 1). The Supreme Court, however, did not decide the question,

but decided the case on other points, stating: *"This makes it unnecessary for us to consider the contention on behalf of the barge that the exemption clause is void."* (259 U. S. 12.) Had the Court adopted the view taken by the Circuit Court of Appeals, it would have held that the contention on behalf of the barge, that the exemption clause is void, was settled in its favor by the decision of the *Syracuse* case.

In fact the discussion of this question in the opinion of the Court (259 U. S. pages 11-12) shows quite clearly that the *dictum* in the *Syracuse* case, relied upon by respondent, is not considered by this Court to be the law settling this question. Suppose it were true that the *Syracuse* case had decided that a towboat company cannot by contract exempt itself from damages caused by the negligence of the navigator of the tug, the discussion in the *Mylroie* case would have taken a different turn. The Court said:

> "The agreement of the tug to render to the barge reasonable assistance from time to time in any emergency which might arise, and the exemption of the tug company from liability for any damage which might happen to the barge or its cargo while in tow, seem in conflict, but it is our duty to reconcile them if we can." (259 U. S. 11.)

If the supposed *Syracuse* doctrine had been the law, the obvious and easy way to reconcile the conflict would have been to apply the supposed doctrine to "the exemption of the tug company from liability for any damage which might happen to the barge or its cargo while in tow", and, following the *Syracuse*

case, to hold that this exemption is void. No resort to construction, no citation and discussion of the House of Lords case (259 U. S. 11-12) would have been necessary in aid of the construction. The fact that the Court considered the problem before it to be the reconciliation of two clauses seemingly in conflict, by finding the true construction of both clauses, seems to be a conclusive indication that the Court would consider the exemption clause, standing alone, as being valid and binding upon the parties to a towage contract.

The *Syracuse* case is thoroughly and ably analyzed in the case of the *Pacific Maru,* recently decided in the District Court for the Southern District of Georgia (8 Fed. (2nd) p. 166). The Court there shows clearly that no argument was urged upon the Supreme Court that the contract exempted the *Syracuse* from liability for its negligence; that the answer contained no plea of exemption from liability for negligence; that this issue was therefore not before the Supreme Court, and that the language used in the opinion was *obiter.*

Certainly a decision on the validity of a contract exempting from liability for damages caused by negligence was not necessary to the decision of the *Syracuse* case, and the question, whether the contract exempting a tug from liability for negligence is valid, or void as against public policy, still awaits an express answer by the Supreme Court. An implied answer, we think, has been given in the *Mylroie* case.

In the *Pacific Maru* case (page 172), the Court said:

> "The question of the right of a towboat to exempt itself from liability for negligence has been a subject in the minds of lawyers and the operators of such boats for many years."

The Circuit Court of Appeals for the Second Circuit has answered this question in the affirmative, the Circuit Court of Appeals for the Ninth Circuit has answered the same question in the negative. It is a question of great importance to the shipping world and awaits the decisive answer of this supreme tribunal. On principle there is no question of public policy involved in a case of towage, as in the case of a common carrier.

It is settled that the parties in a case where public policy does not forbid have the right to provide against liability for negligence.

Hartford Fire Ins. Co. v. Chicago etc. Ry. Co., 175 U. S. 91;
McCormick v. Shippy, 124 Fed. 48.

In *B. & O. R. R. v. Voight*, 176 U. S. 498, this Court held that an express messenger in an express car may by contract exonerate the railroad company from liability to him, such a contract not contravening public policy. The reason stated is that the railroad company does not assume towards him the obligations of a common carrier; that as to him it assumes the obligations of a private carrier; that a private carrier is free to contract as to the conditions of the carriage, and no reason of public policy forbids such carrier

from stipulating against its own negligence and making it a part of the contract.

In *Ten Eyck v. Director General of Railroads,* 267 Fed. 974, the Circuit Court of Appeals for the Second Circuit was urged to rule "that public policy forbids the enforcement of a condition of the contract relieving the tugs employed in the service from responsibility for any damage done to the tow through negligence of the master or crew of the tug while engaged in the performance of towage service", but held that such a contract is not invalid as against public policy.

In *The Pacific Maru* (supra), the District Court for the Southern District of Georgia, after an exhaustive review of the authorities and thorough consideration of the principles, held that the provision in question is not contrary to public policy and is valid.

It is reasonable that a towing company, in making its contracts, should take into consideration not merely the cost of its services and a reasonable profit thereon, but also the great risk of large losses naturally attendant upon its business. In that respect it is in a different position from a common carrier. Another point of distinction is that the owner of the tug, and the owner of a tow, are more nearly in a position of equality than the shipper and common carrier in their relation to one another, so that there is less inherent necessity for the protection of the owner of the tow against the owner of the tug and a stronger reason for letting them make their contracts as they choose. Another distinctive feature is that the shipper class is enormously larger than the class of owners of vessels to be towed, so that a greater necessity exists for pro-

tection. And a further ground of distinction is that, when the shipper entrusts his goods to the railroad or steamship, he relinquishes all control thereof and trusts perforce exclusively to the skill and diligence of the carrier in handling his goods, whereas the owner of the vessel to be towed may, and usually does, maintain partial control of his property and is therefore in a position to counteract the possible negligence of the owner of the towboat. Any of these reasons, and others that could be suggested, are sufficient for making a distinction, in the minds of the same Court, between the power of the common carrier to exempt himself by contract from liability for his negligence, and the corresponding power of the owner of a towboat, and for coming to the conclusion that public policy denies this power to the common carrier, whereas it concedes it to the towboat man.

It may be proper to again call attention to the fact that the argument touching upon this question of public policy is predicated upon the theoretical assumption that respondent's contention on this phase is correct. Petitioner, of course, has no intention to abandon its strong conviction that the contract before the Court is not a towage contract, and has none of the features of a towage contract, but that it is in fact a contract of affreightment, evidenced by a bill of lading, between respondent shipper and petitioner, a common carrier of merchandise by river boats, and that, therefore, the Harter Act governs the instant case.

For the foregoing reasons the decree of the Circuit Court of Appeals, entered in this case on January

26, 1925 (Trans. p. 147), and the decree of the District Court, entered on February 26, 1924 (Trans. p. 120), should be ordered reversed, and a decree should be entered in favor of petitioner, with its costs.

Dated, San Francisco,
January 6, 1926.

Respectfully submitted,
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